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Nos. 07-1428, 08-328

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In The
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF *AMICUS CURIAE* of LAW PROFESSORS AND OTHER ACADEMICS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

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INTEREST OF *AMICI*

Amici Brian T. Fitzpatrick, Lino A. Graglia, Gail Heriot, George R. La Noue, Nelson Lund, Kenneth L. Marcus, Abigail Thernstrom, Stephan Thernstrom and Eugene Volokh are professors of law, history, political science and public policy who have written on, and care deeply about, the development of civil rights law and the application of the Equal Protection Clause in the Fourteenth Amendment to the Constitution. They respectfully submit this brief as *amici curiae* in support of the Petitioners.[1,2]

They submit this brief to emphasize the critical nature of this case and the importance of the Court's decision and to explain why they believe the

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[1] Pursuant to Rule 37, the parties have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Brief *vitae* of the amici are contained in the Biographical Addendum appended hereto.

district court erred and fundamentally misconstrued this Court's teachings on equal protection.[3]

STATEMENT OF THE CASE

In 2003, 118 applicants took an examination administered by the New Haven Fire Department ("NHFD") for promotion to the ranks of captain and lieutenant. Forty-one applicants – twenty-five whites, eight blacks, and eight Hispanics – took the examination for captain. Seventy-seven applicants – forty-three whites, nineteen blacks, and fifteen Hispanics – took the examination for lieutenant. The examination scores and New Haven's established protocol for civil service promotions (the "rule of three") made it likely that "no blacks and at most two Hispanics would be eligible" for promotion to captain and that no blacks or Hispanics would be promoted to the rank of lieutenant. *Ricci v. DeStefano,* No. 04cv1109, at 3 (D. Conn. Sept. 28, 2006) Pet.App. at 7a.

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[3] We refer to the reasoning of the district court because a panel of the court of appeals affirmed in a summary order containing a single substantive paragraph. *Ricci v. DeStefano,* 530 F.3d 87 (2d Cir. 2008). The panel withdrew its summary order and filed a *per curiam* opinion adopting *in toto* the reasoning of the district court. *Ricci v. DeStefano,* 530 F.3d 88 (2d Cir. 2008).

In early 2004 the New Haven Civil Service Board ("CSB") held hearings to determine whether to certify the examination results and promote candidates based on those results. The City of New Haven (the "City" or "New Haven") expressed displeasure at the racial distribution of the examination scores and rankings and the CSB decided not to certify the examination results and no candidates were promoted.

The examinations rejected by the CSB had been composed and validated by New Haven's own testing consultants based on EEOC-recommended practices. Pet.App. 3 16a-3 17a, 329a-335a. See 29 C.F.R. §§1607.5, 1607.14, 1607.16 (providing that content-validity is established by thorough job analyses and identification of essential KSAs).[4] The consultant engaged in a thorough job analysis – using questionnaires, interviews, and "ride-along" exercises with incumbent firefighters and officers to identify the importance and frequency of essential job tasks; minority incumbents were intentionally overrepresented in the samples used in these processes. Pet.App. 150a-154a, 262a-264a, 338a-343a, 597a-650a.

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[4] "KSA" is the acronym in industrial psychology and employment testing for "Knowledge, Skills, & Abilities."

The consultant and City officials made extensive efforts to devise a content-valid and comprehensive oral assessment process for candidates to be rated by panels of fire-service professionals; minorities were overrepresented on all of the three-member oral assessment panels – each of which included two minority members and only one non-minority member. Pet.App. 162a-165a, 268a-270a, 344a-345a, 654a-661a. Post-examination assessments concluded that the panel ratings were consistent and reliable. Pet.App. 164a-168a, 269a-271a, 656a-657a, 661a-663a.

The City's chief civil service examiner testified that she found no flaws in the written examinations or any unfairness in the oral panels' ratings. CA2 J.A. 1243-1244, 1259-1260, 1268.

Candidates of all races passed both exams and were eligible for promotion. Pet.App. 428a-436a. However, the scoring results revealed racial disparities in pass rates and in scores on KSAs. Pet.App. 423a-427a, 950a-957a. Because of the small number of immediate vacancies, applying the rule-of-three meant, according to Respondents, that no African-Americans could be immediately promoted and the new lieutenants "will all be white."[5] Two Hispanics would be among the eight

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[5] Additional lieutenant vacancies arose after the examination that would have allowed three Afri-

(continued...)

promoted to Captain. Pet.App. 439a-445a, 475a-476a.

There is no dispute that the City's reasons for not certifying the examination results were related to the racial distribution of the results. *See Ricci,* No. 04cv1109, at 20-21, Pet.App. 24a-25a. According to the district court, the City's reasons for disregarding the examination results included: (1) the fact that the test would have promoted a smaller percentage of African-American and Hispanic applicants than had taken the examination; (2) promoting from the examination would undermine the City's goal of diversity in the Fire Department; (3) promoting from the examination would not provide enough "role models" for aspiring firefighters; (4) hiring from the list would subject the City to public criticism and political discomfort; and (5) using the list would subject the City to Title VII lawsuits from minority applicants that, also for political reasons, the City did not want to defend. There is also no dispute that Respondents were not relying on an affirmative action plan and were not acting to remedy prior discrimination.[6] Pet.App. 938a-945a.

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[5](...continued)
can-Americans to be promoted. Pet.App. 235a-236a, 305a-306a.

[6] Respondents were not attempting to achieve racial diversity in the officer ranks,

(continued...)

Eighteen candidates -- seventeen whites and one Hispanic -- brought an action in the U.S. District Court for the District of Connecticut. They alleged that the City and several municipal officials violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and other provisions of federal and state law by disregarding the results of the examinations that produced "too many" eligible white candidates and "too few" eligible non-white candidates. On cross-motions for summary judgment, the district court granted defendants' motion for summary judgment and denied plaintiffs' motion.

The district court held that Respondents had not violated Petitioners' rights under the Equal Protection Clause for two reasons. The district court

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[6](...continued)
Pet.App.1013a-1037a, notwithstanding the district court's attribution of this motivation to them. Even if diversity were a compelling interest (which this Court has not held it to be beyond the narrow confines of higher education, *see Grutter v. Bollinger*, 539 U.S. 306,339 (2003)), and even if the City asserted "diversity" as the reason for its action, the City did not explore race neutral alternatives to rejecting the list with predominantly white eligibles that would achieve diversity. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2760 (2007).

first held that the City's rejection of the examination was a race-neutral action because the test was administered in the same manner for all applicants and because the City discarded the scores of all exam-takers. Pet.App. 45a-46a. Although the district court acknowledged that even facially race-neutral decisions can violate Equal Protection if they are motivated by a discriminatory purpose, the district court nonetheless went on to hold that Petitioners could not show such purpose here as a matter of law because "[n]othing in the record in this case suggests that the City defendants or CSB acted 'because of' discriminatory animus toward plaintiffs or other non-minority applicants for promotion,'" *id.* at 43. Because the City's rejection of the examination constituted race-neutral action that was not motivated by a discriminatory purpose, the district court held that the City's action did not need to be tested under this Court's strict scrutiny analysis.

The Court of Appeals affirmed the district court in a *per curiam* opinion in one short paragraph, adopting *in toto* the district court's reasoning. 530 F.3d 88 (2d Cir. 2008).

SUMMARY OF THE ARGUMENT

This case presents the opposite scenario of the usual challenge to an employment or promotional examination: Petitioners do not attack the use of allegedly racially discriminatory exam results, but,

rather, challenge Respondents' reason for their "refusal to use the results." *Ricci,* No. 04cv1109 at 22, Pet.App. 25a.

Amici submit that New Haven's refusal to promote the Petitioner firefighters because of their race violated the Equal Protection Clause. Such race-based government action is fundamentally inconsistent with this Court's settled understanding of the Equal Protection Clause. This Court has consistently subjected such action to strict scrutiny, invalidating it in all but the rarest of circumstances. *See, e.g., Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 224 (1995).

The City's refusal to promote Petitioners was not a race neutral action. It was grounded solely on the racial distribution of the test results, and, as such, it was race-based government action. Indeed, all of the reasons Respondents offered for failing to utilize the City's own examination are based on Petitioners' race. As such, the district court should have applied strict scrutiny to the City's decisions.

Even if the City's action was in some sense facially race-neutral, this Court has held that race-neutral action can be subjected to strict scrutiny if it was motivated by a discriminatory purpose. The district court's holding that only racial animus can count as a discriminatory purpose ignored countless decisions by this Court to the contrary. That is, whether or not the City's action is considered facially

race-neutral, strict scrutiny should have been applied in this case.

We agree with Petitioners' argument that Respondents' action cannot survive strict scrutiny and that the city did not offer a compelling interest to justify its race- based action. Moreover, the remedy selected by the city – cancelling the promotions across the board – was not narrowly tailored to achieve any compelling interest.

Allowing Respondents to cancel the promotions after the administration of a fair and job-related test designed to identify qualified candidates, simply because of the successful candidates' race and Respondents' associated race-based concerns, would allow overt racial balancing, de facto quotas, and race politics in government hiring, all consequences the Court has repeatedly condemned in other contexts.

ARGUMENT

A. The City's refusal to promote from the examination was not a race-neutral action.

Petitioners' claim that the City's decision to discard the examination results was race-based discrimination in violation of the Equal Protection Clause because it was undertaken solely to reduce the number of high-scoring white applicants and increase the number of eligible non-white candidates.

This Court has addressed a government entity's claim that race-based decisions were necessary to redress a racial imbalance in the closely analogous context of government contracts. In *City of Richmond v. J. A. Croson Co.*, the Court held that: "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . ." 488 U.S. 469, 499 (1989). The Court further observed that:

> [W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. A governmental actor cannot render race a legitimate

> proxy for a particular condition merely by declaring that the condition exists. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

Id. at 500-01 (internal citations omitted).

When a state [or local] government explicitly classifies its citizens by race, a court will examine that action using the "strict scrutiny" standard under the Equal Protection Clause. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). A court must strike down the government action unless the state actor can prove that it acted to further a compelling interest and that action was "narrowly tailored" to achieve that interest. *Id.*; *Gratz v. Bollinger*, 539 U.S. 244, 266 (2003).

"[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S., at 229-230.[7] Petitioners were refused promotions

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[7] *Adarand* "established three general propositions with respect to governmental racial classifications."

(continued...)

because too many were white. The promotions were due under the city's charter and civil service rules. Pet.App. 74a-87a, 99a-114a. Every reason advanced

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[7](...continued)

> First, skepticism: Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. Second, consistency: The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification, *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. Third, congruence: Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Taken together, these three propositions lead to the conclusion that *any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.*

Adarand, 515 U.S. 200, 223-24 (1995) (quotation marks, internal citations, and brackets omitted) (emphasis added).

by Respondents to justify aborting the promotions was based on the race of the successful candidates – too many were white.

Because race-related reasons were the only reasons Respondents offered, the City's rejection of the examination was not in any sense race-neutral.

The district court's ruling rested in part on the premise that "where a test is administered and scored in the same manner for all applicants, plaintiffs cannot make out a claim that the exam was a facially neutral test used in a discriminatory manner." *Ricci,* No. 04cv1109, at 42, Pet.App. 45a-46a. But the Petitioners did not contend that the "administration" or "scoring" of the test was discriminatory. Rather, the Petitioners contended that the City's *rejection* of the test was discriminatory. The City's decision to do so was based on the racial distribution of the results. As such, it was not racially neutral and it can only be sustained if it can survive this Court's strict scrutiny test. If it were otherwise, municipal employers could reject the results of an employment examination whenever those results failed to yield a desired racial outcome, which is nothing less than a racial quota. Racial quotas, or any race-based government action -- are impermissible under the Constitution unless the action is narrowly tailored to serve a compelling government interest.

B. The District Court incorrectly held that the City had to show "animus" toward whites in order to manifest a discriminatory purpose.

Even if the City's rejection of the examination were treated as race-neutral action, the district court was still incorrect in holding that the rejection need not be analyzed under this Court's strict scrutiny test. This Court has held that even race-neutral actions are to be subjected to strict scrutiny under the Equal Protection Clause if the actions were motivated by a discriminatory purpose. "A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose or object.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). The district court held that -- as a matter of law -- the City had not acted with a discriminatory purpose because it had not acted with racial "animus" and this lack of "animus" immunized Respondents' actions. The district court fundamentally misunderstood this Court's discriminatory purpose cases.

This Court has never held that governments act with a discriminatory purpose only when they act with animus towards a racial group. *See* B. T. Fitzpatrick, "Strict Scrutiny of Facially Neutral State Action and the Texas Ten Percent Plan," 53 BAYLOR L. REV. 289, 309 (2001) ("[I]t is irrelevant whether the state actors harbor ill will or animus towards a particular race when passing legislation."). Rather, the Court has held that

government action motivated by a desire to engineer results to achieve a particular racial outcome constitutes action with a discriminatory purpose. *Id.* This Court has held this even in contexts where it was undisputed that the governments had no animus towards any racial group, but, like the City here, were only trying to help historically underrepresented racial groups.

These holdings can be seen most clearly in this Court's cases on racially gerrymandered voting districts. In these cases, the Court has held that the creation of the voting districts was facially race-neutral because they categorized voters by location rather than race. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) ("Districting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is race-neutral on its face."). Nonetheless, the Court analyzed the cases under strict scrutiny—and has struck down several voting districts—because the districts were drawn with the purpose of engineering a particular racial distribution of voters. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (striking down voting districts because "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

In all of these cases this Court applied strict scrutiny even though the voting district lines were drawn, just as the City's promotion decision was made here, with the purpose of *benefitting*

historically underrepresented racial groups. *See, e.g., Hunt v. Crormartie*, 526 U.S. 541, 546 (1999) ("A facially neutral law . . . warrants strict scrutiny if it can be proved that the law was 'motivated by a racial purpose . . .'"(quoting *Miller v. Johnson, infra*); *Miller v. Johnson*, 515 U.S. 900,911(1995); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (applying strict scrutiny to racial gerrymandering because strict scrutiny applies "not only to legislation that contains explicit racial distinctions but also to . . . statutes that, although race neutral, are . . . 'unexplainable on grounds other than race.'"(quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This Court did not rely on any notion that the voting districts were drawn with an "animus" toward whites.[8] *See* B. T. Fitzpatrick, "Can Michigan Universities Use Proxies for Race After the

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[8] The principle is not limited to voting district cases. There was no animus on the part of the government actors in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) or in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2760 (2007) (education cases), or in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (government contracting). In those cases, policy decisions were made with insufficient concern for those injured but not with animus. New Haven's action is more like the racial politics in Richmond, condemned in *Croson*, and allowing such action to pass would vitiate the Equal Protection Clause.

Ban on Racial Preferences?," 13 MICH. J. RACE & LAW 277, 288 (2007) ("[T]he Supreme Court has already held that [facially race-neutral action] in order to benefit underrepresented racial groups must satisfy strict scrutiny in the same way [facially neutral action] in order to benefit whites must.").

The district court was therefore quite wrong when it held that strict scrutiny could be invoked under the Equal Protection Clause only if the City acted with animus toward white firefighters.

C. Respondents' Action Cannot Survive Strict Scrutiny.

The city did not offer a compelling interest to justify its race- based action. It did not claim it was attempting to remedy past official discrimination. The City's stated fear of Title VII litigation or liability based merely on unintentional numerical disparity is not a compelling interest, particularly when Respondents had no reason to think that the test was impermissibly discriminatory. Respondents' putative interest in avoiding political criticism could never be a compelling reason to racially discriminate. The purported interest of providing "role models" for minorities, which the district court wrongly attributed to Respondents, has already been rejected by this Court as a compelling interest. *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Respondents denied that they were seeking "diversity," but in any event, diversity has never been (and should not now be)

accepted by this Court as a compelling interest in the government employment context. Finally, the remedy selected by the city – cancelling the promotions across the board – was not narrowly tailored to achieve any compelling interest.

CONCLUSION

Allowing Respondents to cancel the promotions after the administration of a fair and job-related test designed to identify qualified candidates, simply because of the successful candidates' race and Respondents' associated race-based concerns, would allow overt racial balancing, de facto quotas, and race politics in government hiring, all consequences the Court has repeatedly condemned in other contexts.

The district court's failure to engage in strict scrutiny of Respondent's action is fatal to its reasoning and its ruling. Its judgment, and the decision of the Court of Appeals for the Second Circuit affirming it, should be reversed.

Respectfully submitted,

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BIOGRAPHICAL APPENDIX

Brian T. Fitzpatrick is an Assistant Professor of Law at Vanderbilt Law School. He received his law degree from Harvard Law School. Before joining the Vanderbilt faculty, he served as a law clerk to the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit, was a member of the Supreme Court litigation practice at Sidley Austin in Washington, D.C., and served as Special Counsel for Supreme Court Nominations to U.S. Senator John Cornyn. He has written extensively on the question of when facially race-neutral government action violates the Equal Protection Clause, *see* "Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?," 13 MICHIGAN JOURNAL OF RACE AND LAW 277 (2007); "Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan," 53 BAYLOR LAW REVIEW 289 (2001).

Lino A. Graglia is the A. Dalton Cross Professor of Law at the University of Texas School of Law. He received his B.A. from the City College of New York in 1952 and his LL.B. from Columbia University Law School in 1954, where he was an editor of the Law Review. He was an attorney with the U.S. Department of Justice and practiced law in Washington, D.C. and New York City before joining the Texas law faculty in 1966. He has also taught at the Universities of Virginia, Utah, and Puget Sound. Professor Graglia teaches courses in Constitutional Law and Antitrust. He is the author of DISASTER BY

DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976), a critical analysis of the school busing decisions. He has written widely in both scholarly and popular journals on current issues of constitutional law and the role of the Supreme Court in the American system of government, and is a frequent speaker at scholarly symposia and on radio and television. Some recent publications include: "Restrictions on Judicial Election Campaign Speech: Silencing Criticism of Liberal Judicial Activism," in FREEDOM OF SPEECH 148 (Ellen Frankel Paul, *et al.*, eds.) (2004) (reprinted in J. Social Philosophy and Policy 148 (2004)); "Grutter and Gratz: Race Preference to Increase Racial Representation Held 'Patently Unconstitutional' Unless Done Subtly Enough in the Name of Pursuing 'Diversity,'" 76 TULANE L. REV. 2057 (2004); "Triumph to Tragedy on Race," THE AMERICAN ENTERPRISE 8 (2004); "Brown v. Board: Opposing Views," COLUMBIA LAW SCHOOL REPORT 26 (Summer 2004) 26; "The Myth of a Conservative Supreme Court: The October 2000 Term," 26 HARVARD J. LAW & PUBLIC POLICY 81 (2003); "Why Race Preferences in Admissions Aren't the Answer," THE CHRONICLE OF HIGHER EDUCATION B20 (March 7, 2003); "Winks, Nods – and Preferences," *The Wall Street Journal* (June 25, 2003); "Do Racial Preferences Cause Rather Than Remedy the Black Academic Performance Gap?," 80 TEXAS L. REV. 933 (2002); "Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Prejudice," 85 GEORGETOWN L.J. 1 (1996); "United States v. Lopez: Judicial Review Under the Commerce Clause," 74 TEXAS L. REV. 719 (1996).

Gail Heriot is a Professor of Law at the University of San Diego. She obtained a B.A with highest distinction from Northwestern University in 1978 and a J.D. cum laude from the University of Chicago in 1981, where she served as an editor of the law review. She formerly practiced law at Hogan & Hartson in Washington, D.C. Among the articles that she has written that are relevant to this case are "Taking the Michigan Cases Seriously: Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and Practical Politics," 36 LOY. (CHI.) L.J. 137 (2004) and "Strict Scrutiny, Public Opinion and Racial Preferences on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?," 40 HARV. J. LEGIS. 219 (2003). She is a member of the U.S. Commission on Civil Rights.

George R. La Noue is Professor of Political Science and Professor of Public Policy at the University of Maryland Baltimore County. His Ph.D is from Yale University and he has taught civil rights law for thirty five years. He has worked on legal and policy issues for the United States Department of Labor, the United Equal Employment Opportunity Commission, the United States Department Education's Office for Civil Rights and the United States Commission on Civil Rights. Among other things, he has published nine law review articles, the most recent of which is "'Serious Consideration' of Race- Neutral Alternatives in Higher Education," (with Kenneth L. Marcus) 57 CATHOLIC UNIVERSITY L. REV., No 4 (Summer 2008).

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